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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 924

THE DISTRICT COURT OF MONTEZUMA COUNTY, COLORADO, JOHN H. GALBREATH, as Judge thereof, AND IRENE CLARK WHYTE,

PETITIONERS,

vs.

CLIFFORD BECHER WHYTE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

COME NOW the petitioners, by their attorneys, Duke W. Dunbar, Attorney General, State of Colorado, John B. Barnard, Jr., Assistant Attorney General of the State of Colorado, and Marvin Ping, Attorney for Irene Clark Whyte, and petition the Court for the issuance of a Writ of Certiorari to review a judgment of the Supreme Court of the State of Colorado, being the court of last resort in the State of Colorado, in Clifford Becher Whyte v. the District Court, et al, No. 18964, and show the Court as follows:

1. The opinion sought to be reviewed is reported as "Clifford Becher Whyte vs. District Court of Montezuma County, et al," 346 P. 2d 1012, which opinion is not as yet reported in the official reporter of the Supreme Court of Colorado, but is attached hereto as Appendix "B."

2. The judgment and decree sought to be reviewed was dated September 21, 1959, and was entered at 8:30 A.M., on that date.

3. A petition for rehearing was filed, and the order denying the petition for rehearing was dated December 14, 1959. An application was made for extension of time within which to file petition for a Writ of Certiorari, and on March 11, 1960, an order granting an extension of time within which to file a petition for Writ of Certiorari to and including May 11, 1960, was entered by the Court over the signature of the Honorable Charles E. Whittaker, Associate Justice of the Supreme Court of the United States.

4. The statutory provision relied upon as conferring jurisdiction on this Court to review the judgment or decree in question by Writ of Certiorari is 62 Stat. 929, 28 U.S.C. 1257 (3).

5. The sole question presented for review is as follows:

Where two persons, citizens of the United States of America, and the State of Colorado, and who are both enrolled Indians in the Ute Mountain Tribe of Indians, while residing upon the reservation thereof, contract what would be a valid common law marriage within the State of Colorado, but not a valid marriage under the requirements of the tribal law, the State of Colorado not having disclaimed jurisdiction over said persons, may the District Court of the county in which the reservation lies, consider an action

in divorce by one of the said persons against the other, after the person bringing the action has left the reservation?

6. The question involves the following:

A. Article XIV of the Amendments to the Constitution of the United States, Paragraph 1, which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

B. Article VI, Clause 2, of the Constitution of the United States, which reads as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding."

C. Treaty between the United States of America and the various bands of Ute Indians, concluded March 2, 1868, Article II, 15 Stat. 619, which reads, in applicable part, as follows:

> "Article II. The United States agrees that the following district of country, to-wit: commencing at that

point on the southern boundary line of the territory of Colorado where the meridian of longitude 107° west from Greenwich crosses the same; running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north latitude; thence due west to the western boundary line of said Territory; thence south with said western boundary line of said Territory to the southern boundary line of said Territory; thence east with said southern boundary line to the place of beginning, shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agrees that no persons, except those herein authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon or reside in the Territory described in this article, except as otherwise herein provided."

D. Section 4, an act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado, etc., 21 Stat. 199 at 204, (1880) which provides as follows:

"That upon the completion of said allotments and the patenting of the lands to settle allottees, each and every of the said Indians shall be subject to the provisions of Section 1977 of the revised statutes, and to the laws, both civil and criminal, of the state or territory in which they may reside, with the right to sue

and be sued in the courts thereof; Provided, that their lands and personal property shall not be subject to taxation or execution upon the judgment, order, or decree of any court obtained on any cause of action which may arise during the period named in the above-recited agreement."

E. 16 Stat. 144; Revised Statutes, Sec. 1977; 42 U.S.C. Sec. 1981, which reads as follows:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

F. "An Act to provide a temporary Government for the Territory of Colorado," Sec. 1, 12 Stat. 172, which reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that part of the territory of the United States included within the following limits, viz: commencing on the thirty-seventh parallel of north latitude, where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north on said meridian to the forty-first parallel of north latitude; thence along said parallel west to the thirty-second meridian of longitude west from Washington; thence south on said meridian to the northern line of New Mexico; thence along the thirty-seventh parallel of north latitude to the place of beginning, be and the

same is hereby erected into a temporary government by the name of the Territory of Colorado: Provided, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Colorado until said tribe shall signify their assent to the President of the United States to be included within the said Territory, or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the Government to make if this act had never passed: Provided further, That nothing in this act contained shall be construed to inhibit the Government of the United States from dividing said Territory into two or more Territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion thereof to any other Territory or State."

G. Sections 1 and 2, Chapter 139, Act of 1875, enabling the people of Colorado to form a State, 18 Stat. 474, which read as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of the Territory of Colorado included in the boundaries hereinafter

designated be, and they are hereby, authorized to form for themselves, out of said Territory, a State government, with the name of the State of Colorado; which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever, as hereinafter provided.

"Sec. 2. That the said State of Colorado shall consist of all the territory included within the following boundaries, to wit: Commencing on the thirty-seventh parallel of north latitude where the twenty-fifth meridian of longitude west from Washington crosses the same; thence north, on said meridian, to the forty-first parallel of north latitude; thence along said parallel west to the thirty-second meridian of longitude west from Washington; thence south on said meridian, to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel of north latitude, to the place of beginning."

H. Act of August 15, 1953, Chapter 505, Secs. 6 and 7, 67 Stat. 588 at 590, providing as follows:

"Sec. 6. Notwithstanding the provisions of any enabling act for the admission of a state, the consent of the United States is hereby given to the people of any state to amend, where necessary, their state constitution, or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this act: Provided, that the provisions of this act shall not become effective with respect to such assumption of jurisdiction by any state until the people thereof have appropriately amended their state constitution or statutes, as the case may be."

"Sec. 7. The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislative action, obligate and bind the state to assumption thereof."

I. Sec. 90-1-1, 1953 Colorado Revised Statutes, which reads as follows:

"Marriage is considered in law a civil contract to which the consent of the parties is essential."

J. Chapter 37, Session Laws of Colorado, 1958, Sec. 3, page 221, which reads as follows:

"The District Court shall have jurisdiction of all actions for divorce. The County Court and Superior Court, if any, shall have concurrent jurisdiction of all actions for divorce wherein the complaint shall aver the plaintiff does not seek alimony, child support and a division of property, or either of them, in excess of $2,000.00 in value."

K. Ute Mountain Tribe "Law and Order Code," 1944, Sections 2 and 3, which read as follows:

"Sec. 2. The Ute Mountain Tribal Court shall have jurisdiction over the marriages and divorces of the members of the Ute Mountain Tribe of the Ute Mountain Reservation, as hereinafter defined. Indian custom marriage and divorce shall not be recognized hereafter."

"Sec. 3. Marriage is a personal relation, arising out of a civil contract, to which the consent of the parties

capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization."

7. STATEMENT OF THE CASE

(References in parentheses are to pages in the record)

On July 2, 1958, there was filed in the District Court in and for Montezuma County, Colorado, a divorce complaint wherein Irene Clark Whyte sought a divorce from Clifford Becher Whyte. (30-31) Mrs. Whyte likewise sought custody of two minor children born of the marriage and a property division. Summons was served on the defendant in said action, by delivering a copy of the same, together with a copy of the complaint, to him personally, at Towoac, Colorado (35-37). The Federal question sought to be reviewed was raised by the defendant in the divorce action, by the filing of a motion to dismiss (43), which was based on the contentions that the plaintiff and defendant were both members of the Ute Mountain Tribe of the Ute Mountain Reservation, were resident on said Reservation, were married in accordance with tribal custom on the Ute Mountain Reservation, and that under tribal rule and custom, procedure for divorce is provided in the Tribal Court. Hence, it was argued, the Tribal Court has exclusive jurisdiction, since such jurisdiction had not been delegated by the Federal Government to the State of Colorado (46). The District Court overruled the motion to dismiss (91-3). On January 29, 1959, a complaint for relief in the nature of prohibition was filed in the Colorado Supreme Court, directed to the District Court of Montezuma County; John H. Galbreath, as Judge thereof, and Irene Clark Whyte (3-6). The ground for this petition in prohibition was that the District Court of Montezuma County had no jurisdiction over the parties, by virtue of the fact that the Ute

Mountain Tribe of the Ute Mountain Reservation Indians are treaty Indians, and that the State of Colorado has not acted affirmatively to accept jurisdiction over said treaty Indians in accordance with the provision of the act of August 15, 1953, Chapter 505, Sec. 6-7, 67 Stat. 590. In paragraph 8 of the complaint in the Colorado Supreme Court (5, sub-paragraph C), the complaint states as follows:

> "There is involved the enforcement of a treaty between the United States and a sovereign nation of Indians, and the rights of a tribe of treaty Indians to pass upon the legal rights of its members in duly constituted tribal courts is being interfered with."

Hence, the entire question was one of rights and privileges under the Constitution of the United States and certain treaties, clearly a Federal question.

It appears to be undisputed that the plaintiff, Irene Clark Whyte, and the defendant, Clifford Becher Whyte, have been residents of Towoac, Colorado (47, 78-9) and enrolled on the Ute Mountain Reservation (47), virtually all of their lives; that the plaintiff had moved to Cortez, Colorado, outside the Reservation, just prior to the filing of the action (77-8). The defendant, as shown by his motion, admitted the marriage, but denied that respondent Court had jurisdiction to dissolve the same—that only the Tribal Court could act in the matter (43). The couple had entered into a common law marriage on August 5, 1952 (80) . . . that is to say, a marriage by agreement, without license, solemnization, and without recording the same with the tribal agencies. The Law and Order Code of the tribe requires solemnization and recording in order for the marriage to be effective (56, 132-3). Such is not required under the laws of the State of Colorado. 90-1-1, 1953 C.R.S.

The Reservation in question is within the geographical boundaries of the State of Colorado, and the County of Montezuma (92).

The Colorado Supreme Court, on September 21, 1959, made the alternative rule to show cause absolute, and ordered the dismissal of the complaint in the action in the Montezuma County District Court. (181, Appendix A) The opinion of the Court (Appendix B) based the decision entirely upon the grounds that this was a matter within Federal jurisdiction, and that under such jurisdiction the Indian Tribal Courts had exclusive jurisdiction to hear and consider the matter, thus divesting the Colorado District Court of jurisdiction it otherwise would have (176-178). Thus, the Federal question is the only question which has been involved in the proceeding from the time of the filing of the original motion to dismiss.

8. GROUNDS FOR GRANTING CERTIORARI

On behalf of the petitioners, it is submitted that this is a case falling within the provisions of this Court's rule 19 (1) (a). The Colorado Supreme Court based its decision on *Williams v. Lee,* 358 U.S. 217, 79 Sup. Ct. 269, 3 L. Ed. 2nd, 251, decided by this Court on January 12, 1959. That case involved an action by a white man against an Indian on a Navajo Indian Reservation in Arizona. We submit that in the instant case the Colorado Supreme Court has decided a question of substance, not heretofore determined by this Court, to-wit: Where a marriage relationship exists under state law, the parties to which are Indians, subject to tribal law, but citizens of the state involved, does the State court have jurisdiction to dissolve such relationship? This is not, as was the case in Williams v. Lee, a case where a white man is seeking to enforce an obligation on the part of an Indian in a State

court. It involves an Indian bringing an action to determine a relationship which exists only under State law, in a State court, against another Indian.

There is, however, beyond the specific provisions of the rule, a compelling reason for the court to review this case. As it stands now, an Indian woman and her children, legitimate under Colorado law, though citizens of the State of Colorado, are being deprived of their rights under the laws of Colorado and the Fourteenth Amendment of the Constitution of the United States. Such a situation almost compels this Court to hear their cause.

9. EXPLANATION OF GROUNDS

We have submitted that the question involved is one of substance, not heretofore decided by this Court. The Colorado Supreme Court said that the question had been decided by this Court in the *Williams* case, supra. Obvious and important distinctions exist here:

1. The Williams case involved an action by a non-Indian against an Indian.

2. Arizona had expressly disclaimed jurisdiction over Indian lands in its enabling act as well as in its constitution. Unlike Arizona, the State of Colorado has never disclaimed jurisdiction over Indian Reservations. See *United States vs. McBratney*, 104 U.S. 621.

3. In the *Williams* case, there was no Federal legislation granting jurisdiction. Here, we have Sec. 4, 21 Stat. 199 at 204 (page 3, supra) and Sec. 1977, R.S., therein referred to, which specifically extends the right to sue to the Ute Indians, and subjects them to such suit, under the laws of the State.

Without an extended review of all of the applicable cases of this and other Courts, and a review of the history

of jurisdiction over Indians, which is obviously not permissible under the rules of this Court on petition for Writ of Certiorari, it is difficult to show the many other distinctions that exist between the situation in Arizona and that in Colorado.

However, we believe the above and foregoing, and, we trust, succinct, presentation of the principal distinctions, is more than adequate to show the Court that this question is in the category of those not heretofore decided by this Court.

As to this question being one of substance, our second ground set forth above compels the conclusion that it is, as well as being a most compelling, independent reason to hear the cause of this woman and her children.

The applicable part of the Fourteenth Amendment to the Constitution of the United States (page 2 above), enjoins the State of Colorado from denying the equal protection of its laws to all citizens. This woman and her children are our citizens. They seek the protection of our law. Regardless of the other privileges and immunities that this woman or this man may have by virtue of being treaty Indians, she also has rights as a citizen. If the Colorado Supreme Court's decision is permitted to stand, it means that Indians may be subject to a State law which provides that they are married, which marriage cannot be dissolved because the Tribal Court only has jurisdiction, but which jurisdiction cannot be invoked because the marriage itself is not recognized by the Tribal Court.

We submit that this marriage exists by virtue of Colorado law. The wife lives in Colorado, and looks to the Colorado Court for such relief as may be permissible by virtue of the marriage existing under Colorado law. Under Colorado law, her children are legitimate, and entitled to protection as such. To take these rights from them be-

cause they are Indians is a step back to the day when equal justice was not available to those with darker skins.

Mrs. Whyte, now living off the Reservation, could not contract another marriage, because it would be bigamy under the law of Colorado. However, she cannot dissolve her existing marriage under the law of Colorado, because the Tribal Court has exclusive jurisdiction. She cannot dissolve the marriage under the law of the tribe, because that law does not recognize the existence of the marriage. To place any citizen, Indian or not, under such an impossible set of circumstances, is a matter of grave public importance, raising serious moral implications. In addition, this decision denies the right to establish the legitimacy of the children that are issue of the marriage, and precludes their protection under our law. This is a social injustice that this Court should not permit to stand without, at least, a thorough review of the matter.

If the right to appeal for relief to the district court in Colorado is denied this woman and her children by the failure of this Court to review the action of the Colorado Supreme Court, we have left them in a position where they have no recourse whatsoever. We respectfully urge this Court to undertake a detailed review of this case and correct this obvious injustice.

Respectfully submitted,

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MARVIN PING,
Cortez, Colorado,
Attorneys for Petitioners.

APPENDIX "A"

That thereupon and on the aforesaid twenty-first day of September, A.D. 1959, the following order was made and entered of record, to-wit:

No. 18964

CLIFFORD BECHER WHYTE,

Petitioner,

vs.

THE DISTRICT COURT OF MONTEZUMA COUNTY, COLORADO, JOHN H. GALBREATH, as Judge thereof, and IRENE CLARK WHYTE,

Respondents.

Original Proceeding

On consideration of the pleadings and briefs filed herein, it is hereby ordered, adjudged and decreed that the rule to show cause heretofore issued in this action be, and it hereby is, made absolute.

It is further considered, ordered and adjudged that Civil Action No. 2791 pending in the District Court of Montezuma County, wherein Irene Clark Whyte is plaintiff and Clifford Becher Whyte is defendant be dismissed by said District Court.

APPENDIX "B"

That thereafter and on, to-wit: the twenty-first day of September, A.D. 1959, the opinion of the court in said cause was announced and filed, which opinion is in words and figures as follows, to-wit:

No. 18964

CLIFFORD BECHER WHYTE,

Petitioner,

vs.

THE DISTRICT COURT OF MONTEZUMA COUNTY, COLORADO, JOHN H. GALBREATH, as Judge thereof, and IRENE CLARK WHYTE,

Respondents.

Filed in the SUPREME COURT Of The State of Colorado Sept. 21, 1959.

George A. Trout, Clerk.

ORIGINAL PROCEEDING

EN BANC — RULE MADE ABSOLUTE

Mr. Warren O. Martin, Mr. Fred M. Winner, Mr. Max D. Melville, Messrs. Milenski and Parga, Attorneys for Petitioner.

Mr. Duke W. Dunbar, Attorney General, Patricia H. Maloy, Assistant Attorney General, Attorneys for Respondent District Court, etc.

Mr. Marvin Ping, Attorney for Respondent Irene Clark Whyte.

MR. JUSTICE MOORE delivered the opinion of the Court.

This is an original proceeding in which a rule issued, directed to the above named respondents, to show cause why the relief prayed for by petitioner should not be granted.

Petitioner alleges that he and the respondent Irene Clark Whyte are members of the Ute Mountain tribe of the Ute Mountain Reservation Indians; that at all times material to the issue presented each of them was a duly enrolled Indian of said reservation; that respondent Irene Clark Whyte filed a complaint in divorce in the district court of Montezuma County, Colorado, in which she alleged that she and petitioner were married at Towaoc, Colorado, on August 5, 1952. Towaoc is within the boundaries of the Indian reservation. Petitioner further alleges that he filed a motion to dismiss the divorce action on the ground that the court lacked jurisdiction because the parties to said action were members of the Ute Mountain Tribe of the Ute Mountain Reservation and that they were domiciled on said reservation; that the respondent judge overruled the motion to dismiss; that the members of the Ute Mountain Tribe of the Ute Mountain Reservation Indians are treaty Indians and the State of Colorado has not acted affirmatively to accept jurisdiction over said treaty Indians in accordance with the provisions of the Act of August 15, 1953, c. 505, Sec. 6-7; 67 Stat. 590. It is further alleged that the state court has no jurisdiction over the parties or the subject matter of the action and that the sole jurisdiction to determine the controversy between the parties rests in the tribal court of said tribe of treaty Indians; that in the divorce action respondent Irene Clark Whyte seeks a division of property, support money and attorneys' fees. Petitioner alleges that the control of allotted tribal funds is involved, as well as the enforcement

of a treaty between the United States and a sovereign nation of Indians, and that the rights of a tribe of treaty Indians to pass upon the legal rights of its members in duly constituted tribal courts is being interfered with by the respondents.

Respondents by answer admit generally the facts set forth in the petition; allege that the petitioner and the plaintiff in the divorce action were "at all times pertinent hereto domiciled in the State of Colorado, residing within the boundaries of the County of Montezuma and the Sixth Judicial District"; and alleged that the district court has "full jurisdiction of the parties and the subject matter involved" in the divorce action. As a second return to the rule respondents allege the following:

> "1. That by its Enabling Act the State of Colorado was granted and, through adoption of its Constitution, accepted general civil jurisdiction of Indian Reservations within its boundaries and, further, that the Federal Government has not retained nor asserted jurisdiction of the matter herein involved.
>
> "2. That the Tribal Court of the Ute Mountain Tribe has no jurisdiction of divorce proceedings involving a common law or tribal custom marriage such as the one concerned in Civil Action No. 2791 sought to be prohibited.
>
> "3. That under the Constitution and laws of the United States and the Constitution and laws of the State of Colorado, the respondent Court has full jurisdiction of petitioner Clifford Becher Whyte and respondent Irene Clark Whyte, and of the subject matter of Civil Action No. 2791."

The question to be determined is whether the respondent court has jurisdiction to proceed to judgment in the divorce action. If answered in the affirmative the rule should be discharged. If the answer is in the negative the rule should be made absolute.

The Congress of the United States and the duly constituted officers of the federal government since adoption of the Constitution have had the power to regulate dealings with the Indians. The Supreme Court of the United States, speaking through Chief Justice John Marshall in *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 8 L. ed. 483, said:

> "(The Constitution) confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restriction on their free actions. The shackles imposed on this power, in the confederation, are discarded."

Under the Constitution of the United States the jurisdiction of the federal government over all Indian affairs is plenary and subject to no diminution by the states in the absence of specific congressional grant of authority to them to act. *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. ed. 228; *United Stats v. McGowan*, 302 U.S. 535, 58 S. Ct. 286, 82 L. ed. 410; *Perrin v. United States*, 232 U.S. 478, 34 S. Ct. 387, 58 L. ed. 691.

As a corollary to federal sovereiguty it is clear that state laws have no force within the territory of an Indian tribe in matters affecting Indians. *Patterson v. Council*

of Seneca Nations, 245 N.Y. 433, 157 N. E. 734; *Blanset v. Carden*, 256 U.S. 319, 41 S. Ct. 519, 65 L. ed. 950; *Dole v. Irish*, 2 Barb, (N.Y.) 639; *Oklahoma Land Co. v. Thomas*, 34 Ok. 681, 127 P. 8; *Donnelly v. United States*, 228 U.S. 243, 33 S. Ct. 449, 57 L. ed. 820; *Williams v. United States*, 327 U.S. 711, 66 S. Ct. 778, 90 L. ed. 902. As stated by Cohen in his Federal Indian Law at page 120: "It is well settled that the state has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the federal government."

The case of *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. ed. 2d 251, decided by the Supreme Court of the United States January 12, 1959, is the last word on the subject under consideration. We think it controls the instant action. In that case the court held that where a white man entered into a contract with a Navajo Indian on a Navajo Reservation in Arizona, the state courts of Arizona were without jurisdiction to grant relief in an action to recover the agreed price for goods sold by the white man to the Indian. The court's opinion contains the following pertinent language:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. (cit. om.) The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."

We are in accord with the argument of counsel for petitioner as set forth in their brief:

> "Surely, if a non-Indian's rights under a contract made with an Indian on an Indian reservation are subject to the exclusive jurisdiction of the tribal court, it must follow that a contract of marriage entered into on an Indian reservation between two enrolled members of the tribe must be governed by tribal law. The right to determine this dispute arising under the marriage contract is a right reserved to the sovereign nation of the Ute Mountain Tribe of the Ute Mountain Reservation Indians. That right was reserved by treaty with the United States, and, although Congress has now provided a way in which the states can assume the burdens and the jurisdiction over Indian affairs, Colorado has not taken the requisite affirmative action required by Congress. As was said by Justice Black in *Williams v. Le, supra*, 'To date, Arizona (Colorado) has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable.' Not having accepted the jurisdiction, together with its correlative burdens, the State of Colorado and its courts cannot attempt to determine the rights of two enrolled members of the Ute Mountain Tribe of the Ute Mountain Reservation Indians under a marriage contract entered into on the Indian reservation. Only the tribal courts have jurisdiction, and respondents should be enjoined from proceeding further with the state court divorce action."

Respondents seek to distinguish *Williams v. Lee, supra*, from the instant case on several grounds: One claimed distinction is that the Arizona constitution con-

tains a disclaimer of jurisdiction over Indian lands, whereas the Colorado constitution does not. True, Colorado did not disclaim, but it is entirely clear that this failure to do so cannot conceivably result in Colorado jurisdiction over Indian affairs. For instance, in *Donnelly v. United States*, 228 U.S. 243, 33 S. Ct. 449, 57 L. ed. 820, the defendant, a white man, was charged in federal court under a federal statute, with the murder of a Klamath Indian on that tribe's reservation. Defendant contended that the California state courts had jurisdiction because California was admitted to the Union on the same basis as the original thirteen states, with no *reservation* by Congress of jurisdiction over Indian lands. The Supreme Court rejected this argument, ruling that the state court was without jurisdiction.

The test is not whether a state has disclaimed jurisdiction, but whether Congress has authorized such a jurisdiction within the state. In 1953 Congress adopted an Act (18 U.S.C. Section 1162) which granted to all states the privilege of qualifying for such jurisdiction in Indian affairs. This statute provides in part:

> "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, *their State constitution or existing statutes*, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provision of this Act: Provided, That the provisions of this Act *shall not become effective* with respect to such assumption of jurisdiction by any such State *until* the people thereof have appropriately *amended* their State constitution *or* statutes as the case may be.

"The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or *civil causes of action*, or with respect to both, as provided in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, *by affirmative legislative action*, obligate and bind the State to assumption thereof." (Emphasis supplied)

Colorado has not taken the steps mentioned in the statute which are essential prerequisites to jurisdiction in this case.

Another claimed distinction is that the Ute Reservation is within the exterior boundaris of the State of Colorado; but so is every other Indian reservation within the boundaries of one or more states. *United States v. McBratney*, 104 U.S. 621, upon which respondents rely in this connection is clearly distinguishable on the facts. The additional fact that the General Assembly included the Indian reservation within the territorial boundaries of counties, voting precincts, and judicial districts, does not alter the result. The Arizona Indians reservation involved in *Williams v. Lee*, supra, is also within such boundaries. *Harrison v. Laveen*, 67 Ariz. 337, 196 P. (2d) 446; *Dennison v. State*, 34 Ariz. 144, 268 Pac. 617.

Our conclusion is that the respondent District Court was without jurisdiction to hear the divorce action, and the question hereinabove propounded is answered in the negative.

The rule is made absolute.

MR. JUSTICE DAY not participating.

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Office-Supreme Court, U.S.
FILED
JUN 3 1960
JAMES R. BROWNING, Clerk

No. 924

October Term, 1959

IN THE

Supreme Court of the United States

THE DISTRICT COURT OF MONTEZUMA COUNTY, COLORADO, JOHN H. GALBREATH, as Judge thereof, AND IRENE CLARK WHYTE,

Petitioners,

vs.

CLIFFORD BECHER WHYTE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Colorado (App. A. of Petition) is reported at 346 P. 2d 1012.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Do Colorado courts have jurisdiction to grant a divorce in an action between two enrolled members of the Ute Mountain Tribe of Indians both of whom are residents of the Ute Mountain Reservation where the claim for relief arose on the reservation?

STATEMENT

Irene Clark Whyte filed a complaint in divorce in the District Court of Montezuma County, State of Colorado. In her complaint she prayed for a divorce from the defendant, Clifford Becher Whyte, custody of the parties' children, division of property and other relief.

Defendant moved to dismiss the complaint on the ground that the District Court lacked jurisdiction. This motion was denied.

Clifford Becher Whyte then filed an original proceeding in the nature of prohibition in the Colorado Supreme Court raising the same jurisdictional question.

The Colorado Supreme Court held the trial court was without jurisdiction. *Whyte v. Whyte*, 346 P. 2d 1012.

From this decision, petitioners seek review on writ of certiorari.

The jurisdictional question is based upon the following facts: Both parties in the trial court were enrolled members of the Ute Mountain Tribe of Indians, and at all times material they resided on the Reservation of that Tribe. The parties were married at Towoac, Colorado, on August 5, 1952. Towoac, Colorado, is within the boundaries of the Reservation. These facts appear in the complaint filed in the trial court by Mrs. Whyte and are admitted by Whyte's motion to dismiss. These facts also appear in the complaint filed in the Colorado Supreme Court and they are admitted in the answer filed there.

The Ute Mountain Tribe of the Ute Mountain Reservation is a self-governing body and has enacted rules and regulations concerning divorce. The Tribe has a tribal court for the determination of domestic relations matters and disputes among members of the Tribe (Exhibits B and C to the complaint in prohibition).

Based upon these facts the Colorado Supreme Court held that the tribal court had exclusive jurisdiction over the divorce action and that the Colorado court had no jurisdiction.

ARGUMENT

I

THIS COURT HAS RECENTLY DETERMINED THE SAME FEDERAL QUESTION

Rule 19 (1) (a) is relied upon by petitioners as the basis of jurisdiction on write of certiorari:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

We have some doubt that a holding by the Colorado Supreme Court limiting the jurisdiction of inferior Colorado state courts presents a substantial federal question. However, it is not necessary to rely upon this because *the same federal question was determined by this court on January 12, 1959. Williams v. Lee*, 358 U.S. 217.

In that case, Lee, a white man, brought a civil action against an Indian. The dispute arose from the sale of goods on the reservation. The Court said, 358 U.S. 223:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there * * *."

Here we have a civil action between Indian and Indian. The marriage took place on the Reservation. The claim for relief arose there. The rule of the Williams case applies to this case, and the Colorado courts have no jurisdiction. Accordingly, the Colorado Supreme Court decided the identical question theretofore determined by this court, and in addition decided it in accord with applicable decisions of this court.

It is obvious that unless petitioners can distinguish *Williams v. Lee*, they have no grounds on which to seek certiorari. Beginning on page 12 of their brief, they claim these distinctions.

1. The Williams case involved an action by a non-Indian against an Indian. This is a difference without a distinction. Manifestly, in an action between two Indians, the Colorado courts would have less basis for jurisdiction than Arizona where the action was between white and Indian.

2. "Arizona had expressly disclaimed jurisdiction over Indian lands in its enabling act as well as in its constitution. Unlike Arizona, the State of Colorado has never disclaimed jurisdiction over Indian Reservations. See *United States v. McBratney*, 104 U.S. 621."

True, Colorado did not disclaim, but it is entirely clear that this failure does not confer jurisdiction on the Colorado courts to handle Indian affairs. This argument was rejected in *Donnelly v. United States*, 228 U.S. 243. Nor is this the reasoning of this court in *Williams v. Lee*.

United States v. McBratney, 104 U.S. 621, is cited by petitioners. It held that Colorado had jurisdiction to try a murder case where one *white man* killed another *white man* on the Reservation. But in *Williams v. Lee*, 358 U S. 217, 219-220, the Court said that this rule did not apply to cases involving Indians.

3. It is claimed that 21 Stat. 199, 204, gives petitioner Irene Clark Whyte the right to sue in Colorado courts. Petitioners are in error for these reasons:

(a) The section cited by petitioners on page 4 of their brief provides that upon the completion of "allotments" the "allottees" shall be subject to state laws. But there is not a single word in the record showing that either of the Whytes lived on allotted land or that either of the Whytes were allottees.

(b) It is a matter of public record that it is not allotted land: House Report No. 2680, 83d Cong., 2d Sess., September 20, 1954, Report With Respect To The House Resolution Authorizing The Committee On Interior and Insular Affairs To Conduct An Investigation Of The Bureau Of Indian Affairs Pursuant To House Resolution 89, 83d Cong., page 298.

Consolidated Ute, Ute Mountain (p. 297)

"(c) The members of this tribe of Indians all live on tribal land. They have no allotments nor assignments, with the exception of the Allen Canyon group in Utah who were given allotments."

See also, House Report No. 2503, 82d Cong., 2d Sess., pages 1008-1009.

(c) There is authority for the proposition that even if it were allotted land, Colorado would not have jurisdiction. See *United States v. Nice*, 241 U.S. 591.

There are no valid distinctions between this case and *Williams v. Lee*, and the questions were answered by this Court in 1959. There is no valid reason to grant certiorari.

Petitioners argue (brief p. 13) Mrs. Whyte was denied equal protection of the law. This cannot be if Mr. Hugh Lee was afforded equal protection in *Williams v. Lee*.

Finally, petitioners say that this is a common law marriage; that under tribal law such a marriage is not recognized; and, accordingly, that Colorado courts have jurisdiction. This argument fails for these reasons:

(1) Petitioner Irene Whyte alleged a marriage, and that averment is admitted by the motion to dismiss.

(2) Whether there is a marriage depends upon tribal law, not upon state law. *Raymond v Raymond*, 8 Cir., 83 F. 721; *Kobogum v. Jackson Iron Co.*, 76 Mich. 498, 43 N.W. 602. See also *United States v. Quiver*, 241 U.S. 602.

(3) If a valid marriage under state law is proved, the

tribal court has jurisdiction to divorce. *Cyr v. Walker*, 29 Okla. 281, 116 P. 931.

(4) Petitioners seek to base jurisdiction on the existence or nonexistence of the marriage — one of the elements which must be proved on trial. Obviously, jurisdiction is not to be determined on the asserted merits of petitioner Irene Whyte's case.

II

THE DECISION BELOW IS CLEARLY CORRECT

The Colorado Supreme Court applied the doctrine of *Williams v. Lee*. Accordingly the decision is clearly correct. Numerous other cases dictate the same result. *United States v. Quiver*, 241 U.S. 602; *Nofire v. United States*, 164 U.S. 657; *Raymond v. Raymond*, 8 Cir., 83 F, 721; *Boyer v. Dively*, 58 Mo. 510. See also Cohen, *Federal Indian Law*, p. 137; and *Native American Church v. Navajo Tribal Council*, 10 Cir., 272 F. 2d 131.

CONCLUSION

The petition for a writ of ceritorari should be denied.

Respectfully submitted,

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